

1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK
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3 IN RE BANK OF AMERICA CORP.
4 SECURITIES, DERIVATIVE, AND
5 EMPLOYEE RETIREMENT INCOME 09 MD 2058 (PKC)
SECURITY ACT (ERISA) LITIGATION 11 CV 7779 (PKC)
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6
7 February 17, 2011
8 2:15 p.m.

9 Before:

10 HON. P. KEVIN CASTEL

11 District Judge

12 APPEARANCES

13 BERNSTEIN LITOWITZ BERGER & GROSSMANN LLP
Attorneys for the Plaintiff Class
14 BY: STEVEN SINGER

15 KAPLAN FOX & KILSHEIMER LLP
Attorneys for Lead Plaintiffs in Securities Litigation
16 BY: FREDERIC FOX
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17 KESSLER TOPAZ MELTZER & CHECK LLP
Attorneys for Lead Plaintiffs in Securities Litigation
18 BY: DAVID KESSLER

19 BERNSTEIN LITOWITZ BERGER & GROSSMANN LLP
Attorneys for Plaintiff Class
20 BY: MAX BERGER

21 CURTIS TRINKO
Attorney for Derivative Plaintiffs

22 JEFFREY ALMEIDA
23 REBECCA TINIO
Attorneys for Derivative Plaintiffs
24
25

APPEARANCES (Cont'd)

STEVEN FINEMAN

Attorney for NYSTRS Plaintiffs

JOSH PORTER

Attorney for NYSTRF Plaintiffs

SAXENA WHITE

Attorneys for Derivative Plaintiffs

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BY: MITCHELL LOWENTHAL

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BY: ERIC ROTH

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BY: LARRY PORTNOY

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Attorneys for Defendant John Thain

BY: DAVID HOFFNER

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Attorneys for Defendants Merrill Lynch & Co. Inc., et al.

BY: TERENCE GILROY

1 (Case called)

2 (In open court)

3 THE DEPUTY CLERK: In re: Bank of America Corp. Is
4 the plaintiff ready?

5 MR. SINGER: Steven Singer of Bernstein Litowitz
6 Berger & Grossmann LLP, co-lead counsel for lead plaintiff in
7 this securities class action.

8 THE COURT: Good afternoon, Mr. Singer.

9 MR. FOX: Good afternoon, your Honor. Frederick Fox,
10 Kaplan Fox & Kilsheimer, LLP, for the lead plaintiffs in the
11 securities litigation.

12 MR. KESSLER: Good afternoon, your Honor. David
13 Kessler from Kessler Topaz Meltzer & Check on behalf of the
14 lead plaintiffs.

15 MR. KAPLAN: Good afternoon, your Honor. Robert
16 Kaplan, Kaplan Fox & Kilsheimer for the lead plaintiffs in the
17 securities actions.

18 MR. BERGER: Good afternoon, your Honor. Max Berger,
19 Bernstein Litowitz Berger & Grossmann. I'm with Mr. Singer.

20 THE COURT: All right, good afternoon.

21 MR. JONES: Good afternoon, your Honor. Christopher
22 Jones, Saxena White, for the derivative plaintiffs.

23 THE COURT: All right. Let me just pause for a
24 second. Your name again?

25 MR. JONES: Christopher Jones.

1 THE COURT: I have it. Okay thank you.

2 MR. TRINKO: Curtis Trinko for the derivative
3 plaintiffs, your Honor.

4 THE COURT: All right.

5 MR. LOWENTHAL: Mitchell Lowenthal --

6 THE COURT: Let's just see. For the individual
7 plaintiffs we have, Mr. Almeida, is it?

8 MR. ALMEIDA: That's me, your Honor. Yes.

9 THE COURT: Who do you represent?

10 MR. ALMEIDA: I represent ABPIFM. We're part of the
11 ABP complaint and I'm liaison counsel also for the other
12 individual action.

13 THE COURT: All right, and Mr. Fineman on behalf of
14 Schwab?

15 MR. FINEMAN: Yes, your Honor. I'm co-counsel for the
16 NYSTRS plaintiffs.

17 THE COURT: Mr. Porter, who do you represent?

18 MR. PORTER: NYSTRF, Thomas Napoli, New York State
19 Teachers Retirement System and the Public Employees Retirement
20 System Colorado.

21 THE COURT: Rebecca Tinio?

22 MS. TINIO: Yes, your Honor. With Mr. Almeida
23 co-counsel for the plaintiffs in the individual action.

24 THE COURT: Jeanne Christensen?

25 MS. CHRISTIANSEN: Yes, your Honor. We represent Joel

1 Munoz.

2 THE COURT: All right. Have I covered the plaintiffs
3 in this action? Any other plaintiff registering an appearance?
4 All right. Mr. Lowenthal, we'll begin with you for the
5 defendants.

6 MR. LOWENTHAL: You anticipated my answer. I'm here
7 with my partner, Lewis Liman.

8 THE COURT: All right. Good afternoon.

9 MR. ROTH: Good afternoon, your Honor. Eric Roth,
10 Wachtel Lipton Rosenthal for the bank defendants.

11 MR. PORTNOY: Good afternoon, your Honor. Lawrence
12 Portnoy, Davis Polk & Wardwell for the defendants in the
13 derivative action.

14 MR. GILROY: Terry Gilroy from Shearman & Sterling for
15 the Merrill defendants.

16 MR. HOFFNER: Good afternoon, your Honor. David
17 Hoffner, Dechert, LLP for defendant John Thain.

18 THE COURT: And you have Mr. Frackman with you?

19 MR. FRACKMAN: Yes, your Honor. Andrew Frackman
20 O'Melveny and Meyers for Mr. Thain in the Schwab action.

21 THE COURT: How about Shawn Chen?

22 MR. CHEN: Shawn Chen on the telephone, Cleary
23 Gottlieb, also on behalf of Bank of America.

24 THE COURT: Excellent. Let me start with the class
25 notice in the consolidated securities class action. Any

1 objection from the defendants?

2 MR. LOWENTHAL: No, your Honor. We communicated with
3 the plaintiffs in advance and we have no objection to the form
4 of those notices.

5 THE COURT: All right. Thank you. Any other
6 objection by any or any objection by any defendant? Hearing
7 none, I will approve it.

8 There's going to be one addition I'm going to ask you
9 to make to the class notice which will be apparent in a moment.
10 It is my plan to set a trial date in this case and have that in
11 the class notice and I've looked at my calendar, we have a
12 final pretrial conference in this matter set for I believe
13 October 12, and I plan to begin jury selection in this case on
14 October 22, 2012 at 10:00 a.m., and that should be reflected in
15 the class notice.

16 What else can we discuss with regard to the
17 consolidated class action? One thing I would like to do is we
18 already have a schedule on summary judgment motions and
19 pretrial submissions, so that's taken care of. But on
20 September 21, the date for pretrial submissions, I want the
21 parties to make a proposal tailored for this case on the number
22 of hours per side, and I would like support for the proposition
23 and even if it's jointly agreed on, if the plaintiffs and the
24 defendants get together and come up with the concept like we
25 each agree on a hundred hours, it's not likely that I'm going

1 to approve that. So it's got to be justified and it may or may
2 not be the same number for each side. There's something
3 attractive about it being the same number for each side, we'll
4 see, and obviously once set I reserve the right to reconfigure
5 in the interests of justice. If for whatever reason the number
6 that is set turns out not to be adequate under the
7 circumstances, why, I can always make adjustments. But on the
8 going in we'll know how many hours per side on the trial of the
9 case.

10 What else on the consolidated class action? Any other
11 issue that ought to be addressed today?

12 MR. LOWENTHAL: I don't think it's an issue. It's
13 something that we've agreed. It relates to the class notice
14 and I'll let Mr. Kessler disagree, if he does. I've spoken
15 with him. We've agreed that in the event that there are
16 opt-outs that are sent to the administrator both sides will get
17 notice of the opt-outs. Obviously it doesn't belong in the
18 form of notice, but any order the Court might enter in
19 connection with approving it.

20 THE COURT: That sounds reasonable. I was not
21 planning on entering a written order on it. I don't think it's
22 necessary. Actually, what I will do right now is I will write
23 on the face of it, "Approved, see transcript of this
24 proceeding."

25 MR. KESSLER: Your Honor, we were planning on

1 submitting a separate order in approximately a week which will
2 identify the notice administrator.

3 THE COURT: That's fine.

4 MR. KESSLER: And set forth additional materials that
5 your Honor might want to look at prior to entering the order.

6 THE COURT: That's fine. That's absolutely fine.

7 MR. KESSLER: Thank you, your Honor.

8 THE COURT: Now, with regard to Baumeier, is there any
9 appearance by counsel for plaintiff in the Baumeier action?
10 All right. I have that down as the only open motions in any of
11 the cases and if there's any disagreement on that, this is the
12 time to say so.

13 With regard to Schwab, we already have a scheduling
14 order in place with the procedures outlined regarding expert
15 discovery and proceedings following the close of discovery
16 shall not apply to the individual actions or the Baumeier
17 action. The parties to the individual action shall meet and
18 confer to discuss a proposed case management order regarding
19 expert discovery, any unique facts and the proceedings
20 following the close of discovery in those cases.

21 What do you need to do in the Schwab action -- I'll
22 hear from the plaintiff -- that is not covered by the schedule
23 in the consolidated class action? And, again, your name for
24 the record.

25 MR. FINEMAN: Steve Fineman. Good afternoon, your

1 Honor. We're working through liaison counsel at Grant &
2 Eisenhoffer. Just started a conversation this week with the
3 defendants about what if anything we and the other individual
4 cases would need and we're still working through those issues
5 and my understanding is there's another conference scheduled
6 for this coming week.

7 THE COURT: Between and among --

8 MR. FINEMAN: Among the individual lawyers and the
9 defendants' counsel.

10 THE COURT: All right. I am going to direct that so
11 much of a joint proposal as exists with the differences, if
12 any, between and among the sides, be submitted to the Court no
13 later than March 2nd. And that will give you time to work on
14 it all. Come in with a joint proposal. If it's joint only in
15 part you'll tell me what the respective positions of the sides
16 are and I'll resolve that.

17 MR. FINEMAN: Thank you, your Honor.

18 THE COURT: What else? This is all too easy. I will
19 ask for a report from lead counsel as to the status of any
20 settlement discussions and I can do that at the sidebar at the
21 close of this proceeding, and obviously I am not interested in
22 positions that folks have taken, just the status of the
23 discussions.

24 Anything else anybody wants to raise before I close
25 the conference?

1 MR. LOWENTHAL: The only thing that I would, it's not
2 something for the Court to address, I've just been asked to say
3 that to make clear some of my colleagues at Wachtel Lipton have
4 been deposed in this case and just so it's clear to everybody,
5 they will not be trial counsel in this case.

6 THE COURT: Okay. All right. So that's on the
7 record. We are adjourned. Thank you.

8 COUNSEL: Thank you, your Honor.

9 (Adjourned)